

BEFORE THE

ORIGINAL

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 2.106 of the Commission's)
Rules to Allocate Spectrum at 2 GHz for Use by)
the Mobile-Satellite Service)

ET Docket No. 95-18
RM-7927
PP-28

To: The Commission

CONSOLIDATED REPLY TO COMMENTS AND OPPOSITIONS

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SUMMARY

The ICO USA Service Group (“IUSG”) urges the Commission to grant the Emergency Petition for Further Limited Reconsideration filed by the IUSG and ICO Services Limited (“ICO”). The essence of the petition is a request that all BAS licenses, including new licenses, modifications and renewals, granted after the release of the FNPRM in this proceeding be conditioned to require that each such licensee pay for its own relocation costs. This request implies that all such licenses should likewise be conditioned on secondary status. In addition, the petition also made a related request to freeze new BAS and FS license applications and modifications from the date of the release of the MO&O in this proceeding.

No party opposed either the request to condition new BAS licenses or to freeze all FS license applications and modifications. The only party who argued for a BAS freeze ignores the fact that, without such a freeze, incumbent operations would expand in a portion of the spectrum already allocated to MSS.

The IUSG also urges the Commission to grant the IUSG/ICO Petition for Expedited Reconsideration, which asked the Commission to reconsider and reverse its decision denying the Request for Mandatory Submission of Information filed by the constituent members of the IUSG. The information sought will ensure that incumbents provide, on a timely basis, the detailed information necessary for MSS licensees to identify those 2 GHz incumbents with whom the licensees may be required to conduct relocation negotiations and to estimate the expenses associated with the possible relocation. Parties opposed to the information request either misunderstand the importance of providing complete, detailed information, or would provide any such information only after commencement of mandatory negotiations, which would be too late for MSS operators

expecting to commence service in the very near term. In addition, and contrary to what certain parties assert, the Commission has ample grounds to request OMB approval of the IUSG information request.

Finally, the IUSG urges the Commission to deny the Petition for Clarification filed by UTC. As ICO noted in its comments filed in response to UTC's petition, UTC's request for clarification is unfounded because well-established international and domestic procedures exist by which primary FS incumbents and MSS licensees may coordinate their operations.

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CONSOLIDATED REPLY TO COMMENTS AND OPPOSITIONS

BT North America Inc., Hughes Telecommunications and Space Company, Telecomunicaciones de Mexico and TRW Inc. (together, the "ICO USA Service Group" or "IUSG"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby submit the following consolidated reply to the comments and oppositions filed in response to the Emergency Petition for Further Limited Reconsideration¹ and Petition for Expedited Reconsideration filed by the IUSG and ICO Services Limited ("ICO"),² and to the Petition for Clarification filed by UTC, The Telecommunications Association ("UTC"),³ which requested

¹ Emergency Petition for Further Limited Reconsideration, ET Docket No. 95-18 (filed Dec. 23, 1998) ("Licensing Petition").

² Petition for Expedited Reconsideration, ET Docket No. 95-18, RM-7927, PP-28 (filed Dec. 23, 1998) ("Information Request Petition").

³ Petition for Clarification, ET Docket No. 95-18 (filed Jan. 19, 1999) ("UTC Petition").

reconsideration or clarification of the Commission's Memorandum Opinion and Order and Order in the above-captioned proceeding.⁴

I. NO CREDIBLE COMMENTS OPPOSE THE CONDITIONING OF BAS LICENSES AND THE FREEZING OF BAS AND FS LICENSE APPLICATIONS AND MODIFICATIONS BY THE COMMISSION.

In the Licensing Petition, the IUSG and ICO requested that the Commission condition all BAS⁵ licenses, which includes all license modifications and renewals, in the 1990-2025 MHz band issued after the release of the March 14, 1997 FNPRM in this proceeding⁶ to require that each such licensee pay for its own relocation expenses if it is required to relocate as a result of MSS operations in the 2 GHz bands.⁷ The IUSG and ICO noted that, with conditional licensing, the Commission would establish a firm upper limit on the number of BAS licensees that MSS licensees may or may not be required to relocate. The IUSG believes that the benefits derived from establishing a limit on the number of 2 GHz incumbents subject to possible relocation also support the IUSG's separate

⁴ Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order, ET Docket No. 95-18 (FCC 98-309) (released Nov. 25, 1998) ("MO&O," "Third NPRM" or "Order" as appropriate).

⁵ In this pleading, "BAS" will refer collectively to the Broadcast Auxiliary Service, the Cable Television Relay Service ("CARS") and the Local Television Transmission Service ("LTTS").

⁶ Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, First Report & Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 7388 (1997).

⁷ See Licensing Petition at 9.

request for a freeze on new BAS and FS license applications and modifications from the date of the release of the MO&O.⁸

Iridium, LLC (“Iridium”) strongly supported such conditioning of new BAS licenses, concluding that it would protect new MSS licensees in the 2 GHz bands from the unreasonable financial burden of relocating new BAS incumbents who entered the BAS bands with full knowledge that relocation out of the bands was forthcoming.⁹ The IUSG fully agrees. Equally significant, *no party opposed such conditional licensing of BAS (or a total freeze on FS license applications and modifications)*,¹⁰ and only one party, the Association for Maximum Service

⁸ See Comments of the ICO USA Service Group, ET Docket No. 95-18, at 29-30, 41-42 (filed Feb. 3, 1999) (“Comments of IUSG”).

⁹ See Consolidated Comments on Petitions for Reconsideration, ET Docket No. 95-18, RM-7927, PP-28, at 3 (filed Feb. 22, 1999) (“Consolidated Comments of Iridium”).

¹⁰ In response to ICO’s Petition for Further Limited Reconsideration, the American Petroleum Institute (“API”) opposed the conditioning or freezing of FS license renewals. See Opposition of the American Petroleum Institute, ET Docket No. 95-18, at 10-11 (filed Feb. 22, 1999) (“Opposition of API”). API argued that such conditioning or freezing would enable MSS licensees to avoid their relocation obligations by waiting out incumbents’ existing license periods. See *id.* at 11. The IUSG rejects the notion that an MSS licensee eager to commence its service has any logical incentive to wait out an incumbent. But even in the unlikely event that API’s claim were true, renewing a 2 GHz FS license on a primary basis would be inconsistent with the current conditioning of new 2 GHz FS licenses on a secondary basis, see 47 C.F.R. § 101.147 n.20 (1997), and would be inconsistent with the Commission’s International Telecommunications Union (“ITU”) obligations. Thus, the Commission should condition all 2 GHz BAS and FS license renewals granted after March 14, 1997 on secondary status as of January 1, 2000 (the date on which the allocation of 70 MHz to MSS becomes effective).

Television, Inc./National Association of Broadcasters (“MSTV/NAB”), opposed a BAS freeze.¹¹ MSTV/NAB argued, without support, that a freeze on BAS license applications and modifications would halt expansion or development of a service that it claims has become essential to local television service.¹² MSTV/NAB’s concern, however — even if valid — is beside the point. The Commission has already determined that the public interest will best be served by allocating the 1990-2025 MHz band to MSS. To expand incumbent operations there, as MSTV/NAB would do, with reallocation imminent, would obviously run counter to the public interest. For this reason, the Commission should not hesitate to dismiss MSTV/NAB’s groundless objection, and should instead grant the requests to condition all BAS licenses granted since March 14, 1997, including all modifications and renewals, and freeze BAS and FS license applications and modifications in the 2 GHz bands as of November 25, 1998.

II. TO ENSURE THE TIMELY COMMENCEMENT OF MSS AT 2 GHz, THE COMMISSION SHOULD REQUIRE INCUMBENT LICENSEES TO PROVIDE DETAILED OPERATIONAL INFORMATION IMMEDIATELY.

In the Information Request Petition, the IUSG and ICO asked the Commission to reconsider and reverse its decision in the Order denying the Request for Mandatory Submission of Information (“Information Request”) filed by the constituent members of the IUSG on July 30, 1998.¹³ The

¹¹ See Joint Opposition of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters to Petition for Expedited Reconsideration of BT North America Inc., et al., ET Docket No. 95-18, at 4 n.12 (filed Feb. 22, 1999) (“Joint Opposition of MSTV/NAB”).

¹² See id.

¹³ Request for Mandatory Submission of Information, ET Docket No. 95-18, RM-
(continued...)

Information Request sought, among other things, detailed data on the nature and extent of 2 GHz incumbent BAS and FS licensee facilities and operations. The Information Request Petition noted that this data would be used by MSS licensees to identify those incumbents with whom the licensees may be required to conduct relocation negotiations and to estimate the expenses associated with the possible relocation.¹⁴ The Information Request Petition also stressed the urgency of this request, noting that any delay in the production of the requested information could hinder the ability of MSS operators to decide whether and how to enter the U.S. market and thereby deny U.S. consumers the benefits of vigorous competition in the future.¹⁵ The production of the necessary information on a timely basis would be particularly significant in the case of MSS operators, like ICO, expected to commence services in the 2 GHz band in the very near term.¹⁶

The parties opposed to the Information Request Petition failed to grasp the sense of urgency attached to the Information Request. In their oppositions, these parties proffered only the most basic types of information (or information sources) or maintained that the production of information should only be required after the mandatory negotiation period commences. Some parties also argued — incorrectly — that the regulations of the Office of Management and Budget (“OMB”) preclude the Commission from seeking OMB approval of the Information Request. Given the lack

¹³(...continued)
7972, PP-28 (filed July 30, 1998).

¹⁴ See Information Request Petition at 12-13.

¹⁵ See id. at 2, 3-5.

¹⁶ See id. at 4. ICO expects to commence service in the third quarter of the year 2000.

of credible opposition to the Information Request Petition, the IUSG urges the Commission to grant the petition immediately and to commence without delay the collection of the information sought by the Information Request.

A. The Information That Incumbents Offer Lacks the Level of Detail Necessary to Permit MSS Operators to Make Informed Business Decisions.

In the Order denying the Information Request, the Commission recognized that possession of accurate information of the kind sought in the Information Request “is necessary both to us in the formation of our regulatory policies, and to the parties to any relocation negotiation.”¹⁷ Although the Commission missed an opportunity to gather such accurate information when it denied the Information Request, the IUSG urges the Commission to reconsider its earlier decision and recognize that the information which the Commission ultimately requested in the Third NPRM substantially mirrors (albeit, in abridged form) the information sought by the Information Request.¹⁸ At a minimum, the Commission should make clear that the information on incumbent operations offered to date falls woefully short of the level of detail that MSS licensees will need to make informed business decisions.

For example, API suggested that information currently available to the public through the databases of the Wireless Telecommunications Bureau (“WTB”) via the Internet is sufficient to make a preliminary determination as to which FS systems may have to be relocated.¹⁹ API’s

¹⁷ Order, FCC 98-309, slip op. at 25 (¶ 55).

¹⁸ See Information Request Petition at 8-10.

¹⁹ See Opposition of API at 12-15.

endorsement notwithstanding, the WTB databases contain only the most superficial of facts (e.g., frequencies, licensee names and call signs) and, thus, fail to provide the complete level of information that the IUSG and ICO requested and which the IUSG, ICO and Commission need.²⁰ API's reliance on such public information may stem from a desire to avoid having to compile information on its own.²¹ However, the IUSG asserts that the time and expense of assembling the requested information need not be burdensome and, in any event, will become necessary at some point during the relocation process regardless of any burden imposed. The Commission should not be lulled by API into thinking that there is any reasonable alternatives to producing the kinds of information necessary to ensure the success of 2 GHz relocation negotiations.²²

²⁰ See *id.* at 13. API also relies on information soon to be available through the Commission's Universal Licensing System ("ULS"). See *id.* However, API does not specify the type of information that will be available through the ULS. The IUSG understands that, like the information available from the databases of the Wireless Telecommunications Bureau, only the most routine of facts will be available through this system.

²¹ See Opposition of API at 15 (noting that the API approach would avoid collecting the requested information from incumbent licensees and analyzing the information that ultimately is provided).

²² API notes that the information sought by the Information Request concerning equipment age, acquisition cost, present value and depreciation schedule is not relevant because such information has no bearing on the anticipated cost of a replacement system. Opposition of API at 15-16. See also Joint Opposition of MSTV/NAB at 4 & n.13. However, the IUSG urges the Commission to ignore this claim and to require MSS licensees to pay only the current depreciated value of equipment to be replaced, as there is no economic basis for providing incumbents with a windfall in the way of additional funds with which to replace that which has already provided substantial tax benefits. See Comments of IUSG at 33-35.

Like API, MSTV/NAB also misunderstands the importance of providing complete, detailed information. As part of comments filed earlier in this proceeding,²³ MSTV/NAB provided the results of a survey from which it asserts it is possible to determine the general magnitude of BAS relocation costs.²⁴ The information provided, however, is by no means detailed or specific enough to permit MSS operators to determine which facilities may need to be relocated or to develop an accurate estimate of the cost of the relocation effort to be undertaken by each MSS operator.²⁵ In sum, as the inadequate offerings of API and MSTV/NAB indicate, the Commission should recognize that meaningful information detailing the operations of 2 GHz incumbents will only be forthcoming upon grant of the Information Request Petition.

²³ Joint Comments of MSTV/NAB, ET Docket No. 95-18 (filed Feb. 3, 1999).

²⁴ See id. at 19-20 & Exhibit A.

²⁵ The IUSG has recommended previously that the Commission not impose a nationwide, simultaneous relocation of BAS operations in favor of a gradual transition plan that proceeds channel-by-channel rather than market-by-market. See Comments of IUSG at 16-21. See also Joint Comments of Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., Media General, Inc. and Radio-Television News Directors Association, ET Docket No. 95-18, at 7 (filed Feb. 3, 1999) (concluding that a nationwide, simultaneous changeover “is not even remotely practicable”) (“Comments of Cosmos”). Under a gradual transition plan, MSS operators would not (contrary to what MSTV/NAB maintains is necessary) have to negotiate with all BAS incumbents. See Joint Opposition of MSTV/NAB at 5. This underscores the need of MSS operators for detailed information to identify those individual BAS incumbents with whom negotiations may be necessary.

B. The Information Needed by MSS Operators Must Be Provided in a Timely Manner Prior to Mandatory Negotiations.

In addition to providing detailed information on their 2 GHz operations, BAS and FS incumbents must be required to produce this information on a timely basis — and certainly prior to the start of mandatory negotiations. Only the prompt addition of such information to the record of this proceeding will enable the Commission to develop sound 2 GHz policies and provide MSS operators with the relevant data to determine whether and when to commence service at 2 GHz.

The critical need to provide information on a timely basis undermines reliance by certain parties on the Commission's "good faith" guidelines to guarantee the production of information.²⁶ The protections these guidelines offer are inadequate because they only apply to the mandatory phase of the contemplated negotiations, which would not begin until a one-year voluntary negotiation period had elapsed (or, in the case of incumbent 2 GHz public safety licensees, a three-year voluntary period), and then only after an attempt at good faith negotiations had been made.²⁷ Thus, if the Commission sets the date for commencement of voluntary negotiations on the day of release of its next Report and Order in this proceeding, MSS operators may very well not receive the information they request until late in the year 2000 or perhaps in 2001. In the case of ICO, which expects to commence service in the third quarter of the year 2000, delivery of information under these circumstances would obviously come too late. Accordingly, the Commission should

²⁶ See Opposition of the Association of American Railroads, ET Docket No. 95-18, at 9 ("Opposition of AAR"); Opposition to Petitions for Reconsideration, ET Docket No. 95-18, at 3 ("Opposition of UTC"); Joint Opposition of MSTV/NAB at 6; Consolidated Comments of Iridium at 4.

²⁷ See 47 C.F.R. § 101.73(b) (1997).

demonstrate its stated commitment to increase competition in the MSS market by not relying on the good faith provisions of the mandatory negotiation rules to gather 2 GHz incumbent information.

The Commission should also reject the recommendations of MSTV/NAB and Iridium that would rely on collective BAS and FS negotiating entities to gather information on 2 GHz operations.²⁸ Axiomatically, collective negotiating entities would only gather information after negotiations had begun — which, again, would come too late for MSS licensees expecting to commence service in the near term.²⁹

On a related note, MSTV/NAB also asserted that, to the extent pre-negotiation information is gathered, the Commission should not require incumbents to pay for the costs of this information-gathering, thereby implying that such costs should be the responsibility of MSS licensees.³⁰ The IUSG strongly objects to this attempt at burden-shifting. MSTV/NAB must know that, under the Commission's mandatory negotiation rules, incumbents will be required to provide — and thus pay for the gathering of — information requested by MSS licensees.³¹ To argue, as MSTV/NAB does, that this responsibility should somehow be lifted simply because the information is provided prior to

²⁸ See Joint Opposition of MSTV/NAB at 5 (advocating a collective negotiating entity representing broadcasters); Consolidated Comments of Iridium at 4 (advocating an “inter-industry” negotiations team).

²⁹ In any event, the IUSG believes that collective negotiations are not necessary given the implausibility of a nationwide, simultaneous relocation of 2 GHz incumbents, see Comments of Cosmos at 7, and given the integrated licensing and transition proposal of the IUSG and ICO. See Comments of IUSG at 16-21.

³⁰ See Joint Opposition of MTSV/NAB at 4.

³¹ See 47 C.F.R. § 101.73(b) (1997).

the start of mandatory negotiations is unwarranted, and the Commission should not hesitate to reject it out of hand.

C. The Commission Has Ample Grounds to Request OMB Approval of an Information Request.

The IUSG disagrees with those parties who argued that the regulations of the OMB preclude the Commission from seeking OMB approval of the Information Request. Specifically, API and AAR assert that the Information Request fails to meet OMB standards requiring that the information: (1) be necessary for the proper performance of the functions of the Commission, and (2) not unnecessarily duplicate information otherwise reasonably accessible to the Commission.³² As noted previously, however, the Commission agrees with the IUSG and ICO that accurate information of the kind sought by the Information Request is “necessary” to the Commission in the formation of its regulatory policies.³³ Thus, the IUSG submits that granting the Information Request Petition is necessary to the proper performance of the Commission in this proceeding. In addition, the meager information either available to the public or provided by 2 GHz incumbents to date leaves no doubt that the risk of unnecessarily duplicating information is minimal. Accordingly, the Commission has ample grounds to seek OMB approval of the IUSG Information Request, which the IUSG urges the Commission to do without further delay.

³² See Opposition of API at 17-18; Opposition of AAR at 9-10 (citing 5 C.F.R. § 1320.9).

³³ See Order, FCC 98-309, slip op. at 25 (¶ 55).

III. THE UTC PETITION FOR CLARIFICATION SHOULD BE DENIED BECAUSE EXISTING COORDINATION PROCEDURES PROTECT THE INTERESTS OF FS INCUMBENTS.

UTC requested that the Commission clarify statements made in the MO&O regarding the obligation of MSS licensees to relocate incumbent terrestrial FS microwave licensees.³⁴

Specifically, UTC urged the Commission to confirm its policy that MSS licensees must relocate incumbents before commencing operations which could cause harmful interference.³⁵ In its comments, AAR agreed with UTC, asserting the possibility of “misunderstandings” regarding the relocation reimbursement obligations of MSS licensees.³⁶

The IUSG urges the Commission to dismiss the UTC Petition because well-established, existing procedures by which primary FS incumbents and MSS licensees may coordinate their operations and determine whether relocation is necessary eliminate the need for further clarification. These procedures, accurately described by ICO in its response to the UTC Petition,³⁷ include the coordination procedures of the ITU, which guarantee the use of spectrum coordination wherever necessary.³⁸ Domestically, the Commission has promulgated rules that provide for the coordination

³⁴ See UTC Petition at 1.

³⁵ See id.

³⁶ See Comments of the Association of American Railroads, ET Docket No. 95-18, at 2 (filed Feb. 22, 1999).

³⁷ Response to Petition for Clarification, ET Docket No. 95-18 (filed Feb. 22, 1999) (“Response of ICO”).

³⁸ See id. at 3.

and notification of frequency assignments between earth station services and terrestrial services³⁹ and, in addition, is expected soon to adopt methodologies applicable to all 2 GHz MSS licensees.⁴⁰

Regarding the necessity to relocate a primary FS incumbent, the IUSG reminds the Commission that, as a threshold matter, relocation of an incumbent is mandated only where harmful interference from an MSS licensee cannot be avoided by any of a number of other possible alternatives available to the MSS licensee.⁴¹ However, should unavoidable harmful interference be shown, the IUSG agrees with ICO that before the relocation of a primary FS incumbent can be invoked, efforts short of relocation must first be attempted.⁴²

³⁹ See id. (citing 47 C.F.R. §§ 25.130 & 25.203 (1997)).

⁴⁰ See Third NPRM, FCC 98-309, slip op. at 22 (¶ 49). In this regard, the IUSG agrees with ICO that, as a matter of long-standing policy, the United States government consistently has rejected in ITU World Radio Conferences any effort to define quantitative standards for harmful interference in connection with satellite-to-terrestrial or satellite-to-satellite services with the Radio Regulations. See Response of ICO at 4.

⁴¹ See MO&O, FCC 98-309, slip op. at 13 (¶ 27).

⁴² See Response of ICO at 4-5. The IUSG also supports the request of Iridium that the Commission make clear that existing primary FS incumbents in the 2 GHz band maintain their co-primary status relative to MSS licensees, subject to expiration of their current license terms and conditional renewal of their licenses, unless or until an MSS licensee requires use of the subject spectrum or until expiration of the sunset date. See Comments of Iridium LLC, ET Docket No. 95-18, at 3 (filed Feb. 22, 1999). However, the IUSG urges the Commission to reject Iridium's call for a nationwide, simultaneous relocation of 2 GHz incumbents. Id. at 2.

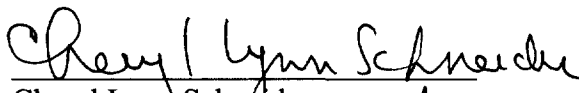
IV. CONCLUSION

For the reasons stated herein, the IUSG urges the Commission to grant the Licensing Petition and Information Request Petition and to deny the UTC Petition for Clarification.

Respectfully submitted,

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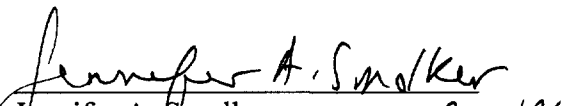
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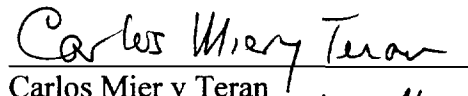
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CERTIFICATE OF SERVICE

I, Michele S. Gottlieb, do hereby certify that copies of the foregoing "Consolidated Reply to Comments and Oppositions" were delivered this 8th day of March, 1999, to the following in the manner indicated:

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